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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of  
DEAS COMMUNICATIONS, INC.  
HEALDSBURG BROADCASTING, INC.  
HEALDSBURG EMPIRE CORPORATION  
For Construction Permit for a  
New FM Station on Channel 240A  
in Healdsburg, California

) MM DOCKET NO. 92-111  
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) File No. BPH-910208MB  
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) File No. BPH-910211MB  
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) File No. BPH-910212MM  
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To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

APPLICATION FOR REVIEW OR, ALTERNATIVELY  
MOTION FOR EXTRAORDINARY RELIEF

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APPLICATION FOR REVIEW OR, ALTERNATIVELY,  
MOTION FOR EXTRAORDINARY RELIEF

Deas Communications, Inc. ("Deas"), by its attorneys and pursuant to Rule 1.115(e)(1), hereby asks the Commission to review and reverse the Review Board's Memorandum Opinion and Order, FCC 92R-82, adopted October 2, 1982 ("MO&O").<sup>1</sup> The MO&O reverses an ALJ order dismissing the application of Healdsburg Broadcasting, Inc. ("HBI"), and in so doing contravenes FCC policy and precedent.<sup>2</sup> Upon review, HBI's dismissal should be reaffirmed.<sup>3</sup>

I. The Board's reinstatement of HBI exceeds its authority and constitutes an abuse of discretion.

1. HBI has always been in violation of FCC technical rules. The Hearing Designation Order, 7 FCC Rcd 3135, 3136 and n. 5 (M.M. Bur. 1992) ("HDO"), denoted serious engineering defects in both the original application and a September 1991 amendment. HBI would not have been designated but for an ambiguity in a rule. HDO, at para. 9.

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<sup>1</sup> The MO&O has not yet been released. The Board made pre-publication copies available to the Judge and parties.

<sup>2</sup> Memorandum Opinion and Order, FCC 92M-874, released August 13, 1992 ("Dismissal Order").

<sup>3</sup> Rule 1.115(e)(1) by its terms allows any party to immediately appeal an interlocutory Review Board action taken under Section 1.301(a). If this rule is deemed unavailable to Deas, extraordinary relief is requested. This appeal comports with recent Commission rulings to speed up hearings. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157 (1990), clarified, 6 FCC Rcd 3403 (1991). It also "involves a controlling question of law as to which there is a substantial ground for difference of opinion and . . . immediate consideration of the question would materially expedite the ultimate resolution of the litigation." Rule 1.115(e)(3). The MO&O's disruptive effect will be compounded if appeal is put off until after a final Board decision is rendered.

2. So, with absolute clarity, and in words impossible to misunderstand, the HDO mandated:

HBI will be given one opportunity to submit a minor curative amendment . . . If the amendment fails to cure the defects, conflicts with a previously filed application, or for any other reason is unacceptable for filing, the amendment along with HBI's original application will be dismissed (emphasis added.)

3. The MO&O never even mentions this mandate.

4. HBI filed its "curative amendment" on June 19, 1992. It, too, was flawed. HBI and the Board concede that it violated a directional antenna rule, Section 73.316(b)(2). That same violation was present in HBI's September 1991 amendment, though the HDO, which dismissed the amendment on related grounds, does not identify it.

5. The HDO was issued under delegated authority; Rules 0.61, 0.283. But it is in all respects a Commission order, not subject to Board reversal. Rule 0.203.<sup>4</sup> The ALJ followed the HDO's "do or die" mandate. The MO&O disregards it without comment. That is an abuse of discretion and exceeds Board authority.<sup>5</sup> On this ground, the MO&O must be reversed.<sup>6</sup>

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<sup>4</sup> Section 0.203(a) states that one acting under delegated authority has "all the jurisdiction, powers, and authority conferred by law upon the Commission." Section 0.203(b) affirms that such a ruling has "the same force and effect . . . as actions of the Commission."

<sup>5</sup> The Board is generally deferential to such "do or die" HDO directives. See LRB Broadcasting, FCC 92R-78; and Crystal Clear Communications, Inc., FCC 92R-79, both released October 7, 1992. That the mandates in these contemporaneous cases are not engineering-related is beside the point. Absent a mistake of fact, the Board lacks authority to ignore or overrule them.

<sup>6</sup> The Board's reversal seems based on the claim that because the Rule 73.316(b)(2) violation was not specified in the HDO, HBI lacked notice that its amended antenna pattern must comply with

II. The MO&O is contrary to law, offends Section 73.3522 and violates the "hard look" policy.

6. The Commission's resolution in Pueblo Radio Broadcasting Service, 5 FCC Rcd 6278 (1990), is controlling here. It further requires reversal of the MO&O.

7. In Pueblo, the Commission affirmed a party's postdesignation dismissal for predesignation violations (of the U.S./Mexico FM Agreement). Unlike HBI, the Pueblo applicant was not permitted to correct its mistakes.<sup>7</sup> Like HBI, it mistakenly relied on Magdalene Gunden Partnership<sup>8</sup> and blamed others for its own negligence.

8. The Commission rejected these arguments. It held that a treaty (like the rules) is foreseeable, that applicants are on notice of its existence and must comply with its terms. Citing longstanding precedent, the Pueblo Commission held the applicant responsible for its agents' mistakes, 5 FCC Rcd at 6279, para. 6. The MO&O inexplicably reverses that holding; see MO&O, at para. 16.

9. The Board's reliance on Gunden, id., and the

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all rules. This position is untenable; para. 2, supra. FCC Form 301 puts parties on notice of their responsibility for all applicable rules. Directional antenna rules are important and HBI's failure following the HDO admonition to flyspeck its amendment for errors is not attributable to anyone but HBI.

<sup>7</sup> Compare MO&O at para. 13: "merely because an application may contain a technical error, the Bureau does not automatically dismiss; in fact it frequently invites later amendments before the ALJ." That is exactly what transpired here. HBI has been treated very charitably, more so than the applicant in Pueblo.

<sup>8</sup> 2 FCC Rcd 5513 (Rev. Bd. 1987) (subsequent FCC history omitted), affirmed sub nom. Marin TV Services Partners, Ltd. v. FCC, 936 F.2d 1304 (D.C. Cir. 1991).

conclusion that HBI showed "good cause" for acceptance of its July amendment (its fourth showing), are wrong. Gunden and HBI have nothing in common; Pueblo, at 6279 n. 4. Indeed, the Board's position in Gunden, affirmed on appeal, was that there was no city coverage violation and thus the applicant could not have foreseen the addition of a city coverage issue. Id. Here it is undisputed that HBI filed two amendments ten months apart, both of which violated the same rule.<sup>9</sup> Such mistakes are patently foreseeable, Pueblo; Rule 73.3522(b)(1).<sup>10</sup>

10. The MO&O errs yet again in its strained conclusion that HBI's negligence does not implicate the "hard look" policy. As the Commission knows, many applications have been dismissed for "hard look" defects less "serious" than HBI's, Pueblo, at 5 FCC Rcd 6278-79.<sup>11</sup>

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<sup>9</sup> The MO&O at n. 20 calls HBI's last filing a "defective" amendment. Deas is constrained to agree with this statement.

<sup>10</sup> The rest of the MO&O's "good cause" analysis is also mistaken. When it filed its fourth engineering in July, HBI never made a full "good cause" showing and did not even mention "foreseeability." The finding that HBI was diligent because its July filing was made 12 days after notice that its June filing was defective, is error: the prohibited pattern tabulation was on file since September 1991 -- ten months -- without correction. This is hardly diligence. The MO&O also omits to say that the July amendment was the product of HBI's voluntary act. Erwin O'Conner Broadcasting Co., 22 FCC 2d 140, 143 (Rev. Bd. 1970). HBI's latest amendment is bereft of "good cause."

<sup>11</sup> See also, e.g., SBM Communications, Inc., 7 FCC Rcd 3436, 3437 (1992) (defective app. dismissed after staff error in designation); R. Donnie Goodale, 7 FCC Rcd 1495, 1497 (staff may dismiss app. despite "readily correctible" coordinate disparity); Domega Broadcasting Corporation, 4 FCC Rcd 1450, 1451 (app.'s lack of knowledge of rules not good cause to amend); Richard P. Bott, II, 3 FCC Rcd 6063, 6064 (1988) (10 second coordinate error sufficient to justify dismissal).

11. Violating a directional antenna rule offends "hard look." In Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications, 7 FCC Rcd 7265 para. 5 (1991), the Commission determined that "hard look" acceptability review

includes such critical factors as . . . compliance with international treaties and adherence to Commission rules involving power, height and spacing. If an application is found to be technically unacceptable, the staff will dismiss it as defective.

(emphasis added; citation omitted). See also FM Applications, 58 RR 2d 166, 169 (penult. para.) (1985). Rule 73.3566(a) warns that applications like HBI's which are patently not in accordance with the rules are defective and if inadvertently accepted, will be dismissed. HBI received more equitable treatment: it was given a postdesignation chance to perfect its application or be dismissed. That is notice personified; the MO&O's contrary conclusion is reversible error.

### Conclusion

The other parties in this case have submitted their hearing exhibits. The record was closed and dates set for proposed findings. But for the MO&O, an initial decision could have been expected shortly. Reinstatement of HBI will disrupt the case and lengthen the time when new service comes to Healdsburg. Since HBI does not deserve to be a party, this grossly disservices the public interest.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 13th day of October, 1992, served copies of the foregoing "Application for Review or, Alternatively, Motion for Extraordinary Relief" upon the following persons by first class United States Mail, postage prepaid:

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